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No. 26

POSSIBILITY OF GOVERNMENT CONTRACT PROVISIONS AS A MEANS OF ESTABLISHING ECONOMIC STANDARDS

Prepared by

JAMES W. IRWIN

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MEMORANDUM TO: SECTION HEADS

January 24, 1936

SUBJECT: WORK MATERIALS NO. 26

POSSIBILITY OF GOVERNMENT CONTRACT PROVISIONS AS A MEANS OF ESTABLISHING ECONOMIC STANDARDS

This preliminary draft on POSSIBILITY OF GOVERNMENT CONTRACT PROVISIONS AS A MEANS OF ESTABLISHING ECONOMIC STANDARDS by James W. Irwin is made available for confidential use within the Division of Review because of its usefulness in connection with other studies.

It is a preliminary draft -- an exploration of the field as a basis for further work. It is not presented as a fully rounded treatment of the subject.

L. C. Marshall
Director, Division of Review

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FOREWORD

This report on the Possibility of Government Contract Provisions as a Means of Establishing Proper Economic Standards, was prepared by Mr. James W. Irwin as a study of the Legal Research Section; Mr. George W. Kretzinger, Jr., in charge.

Preparation of the memorandum was begun at about the time of the adjournment of the first session of the 74th Congress, at which time the Walsh Government Contract Bill was a very live and controversial topic. The assignment of the subject of the memorandum did not by any means limit its scope to consideration of the Walsh Bill, nor indeed refer to it. However, it will be observed that this particular proposed enactment figures largely in the memorandum, as would naturally follow from the fact that it was the practical legislative along the lines assigned for speculative discussion in the memorandum.

Some opinions are expressed in the following memorandum, as on the problem of whether in the application of a plan of governmental contractual requirements as to wage and hour standards it would be necessary that the standards be legislative, as to which others may not agree. However the writer of the memorandum has carefully revised it to omit discussion of policy; and the only opinions expressed are as to law and authority.

LEGAL MEMORANDUM ON POSSIBILITY OF GOVERNMENT CONTRACT PROVISIONS AS A MEANS OF ESTABLISHING PROPER ECONOMIC STANDARDS

I. INTRODUCTORY AND SUMMARY.

The "economic standards" to which attention is usually directed at this time in connection with proposed regulation through means of Government contract provisions, are those pertaining to minimum wages, maximum hours of labor and prohibition of child labor. These are the ones treated in the Walsh Bill. But the same legal principles would apply if other economic ends were sought. In so far as this method of regulation could be applied to wage, hour, and child labor problems, it could be applied also to a wide field similar to that covered by Executive Orders Nos. 6246 and 6646 pursuant to N.I.R.A., which were designed to impose in Government contracts the obligation of compliance with all provisions of applicable codes of fair competition.

The Walsh Bill, it may be mentioned, after having been passed by the Senate at the last session, now reposes with the Judiciary Committee of the House of Representatives. Those controlled by this legislation would be the groups corresponding with those sought to be reached by Executive Order 6646. Those contracting with the Government or its agencies to furnish construction, supplies, property and "services, except professional services," and those contracting for the loan or grant of money from the Government or its agencies, together with sub-contractors entering into agreements in connection with any of the transactions aforesaid.

Such legislation, it seems to be unanimously admitted, would be constitutional, provided the Act establishes definite standards rather than leaving them to be established by administrative action. (See Part IV, infra). On the other hand, there seems to be no disposition anywhere to contend that the Government has the right to require contractual provisions along the line referred to above, until this has been authorized by new legislation. (See Part II, following).

But to the writer of this memorandum, it seems that the proviso in the preceding paragraph to the effect that the standards are to be fixed by legislative action, is unnecessary, and that Congress could leave the fixing of standards entirely to administrative determination. (See Part VI).

This memorandum further asserts the belief that such legislation would not only be valid (Part IV), but if there is to be any governmental approach to the problems of wages, hours, and child labor prohibition, it would be worthy of consideration as practicable and effective. (See Part V).

II. THE SITUATION IN ABSENCE OF LEGISLATION.

Preliminary to the consideration of the legality and desirability of the proposed legislation, the question might present itself as to whether, in the absence of Congressional action, it is legally possible for the Government to require provisions in its contracts fixing economic standards for employees of the other contracting party. It seems that an authoritative answer has been given in the negative. The Government cannot, in its contracts, insist upon proper economic standards in the production or furnishing of the articles, supplies or services contracted for by the Government; because the Government must award its contract, regardless of any conflicting consideration of economics, policies, or ethics, to the "lowest responsible bidder." This is because of Section 3709, R. S., which is as follows:

> "Except as otherwise provided by law all purchases and contracts for supplies or services in any of the departments of the Government and purchases of Indian supplies, except for personal services, shall be made by advertising a sufficient time previously for proposals respecting the same, when the public exigencies do not require the the immdediate delivery of the articles, or performance of the service. When immediate delivery or performance is required by the public exigency, the articles or service required may be procured by open purchase of contract, at the places and in the manner in which such articles are usually bought and sold, or such services engaged, between individuals."

This statute does not say that the bids must be let to the "lowest responsible bidder". The omission is more conspicuous because that express requirement does appear in some of the special statutes.

For instance, 23 Stat. 204 (41 U. S. C. A. Sec. 24) provides that:

> "Whenever it is practicable contracts for the transportation of moneys, bullion, coin, notes, bonds, and other securities of the United States, and paper shall be let to the lowest responsible bidder therefor, * * * * *".

Also, 34 Stat. 835 declares that:

> "Purchases of material and equipment for use in the construction of the Panama Canal shall be ******* from the lowest bidder".

Section 3947 R. S. (amended by Act of May 18, 1916) requires that all contracts for carrying the mail shall be let "to the lowest bidder tendering sufficient guarantees for faithful performance".

But, apparently, it is too late to argue that Section 3709 means only what it literally says. It would seem that the interpretation of this section which requires awards to go to the lowest responsible bidder has been definitely established, and that this interpretation cannot now be questioned.

III. REVIEW OF RULINGS.

This memorandum in original form utilized several pages in discussion of opinions of the comptroller General and the Attorney General which demonstrate the propositions stated in Part II (together with slight relaxations thereof).

For brevity in mimeographing we will merely cite a few such opinions, and discuss one.

The following will be found interesting:

19 Opns. Atty. General 685
28 " " " 254
28 " " " 389

Opn. A-50815, Comptroller General (1934)
Opn. A-47742, " " (1933)
Opn. A-52382, " " (1933)
Opn. A-34106, " "
Opn. A-35879, " "

An opinion which ties directly into discussion of such legislation as is the subject of this memorandum, is A-63153, dated July 1, 1933. It will be recalled that after the Schechter decision outmoded Executive Order 6646 (which required that parties contracting with the Government should furnish a certificate of compliance with the applicable code or with the P.R.A. where there was no applicable code) a new method of meeting the situation was sought through action of an executive nature. The Director of Procurement issued Circular Letter No. 100, to all governmental departments accustomed to enter into contracts for property or services, suggesting that they include in invitations to bid, the following provision:

> "Until such time as proper legislation may be acted upon by Congress the Director of Procurement recommends that in lieu of the code compliance requirements stipulated in Executive Order 6646 * * * all invitations to bid for supplies, materials or construction projects of any character, include the following clause:
>
> > "'Bids are requested on the basis that if subsequent legislation should require observance of minimum wages and or maximum hours of employment and or limitations as to age of employees, in the performance of government contracts, any contract entered into shall be subject to modification in accordance with its

statutory requirements to the extent authorized or required by law * * *".

Circular Letter No. 100 further suggested in regard to pending proposals on which the awards had not been made that if the acceptable bidder would not agree to the inclusion of the foregoing condition in its contract, "new proposals should be issued". The Director of the Veterans' Bureau requested from the Comptroller General an opinion as to his right to reject a bid on the ground that the bidder had declined to agree to the foregoing stipulation respecting observance of future legislation. The Comptroller General in Opinion A-63153, July 1, 1935, ruled that the bidder could not be held prejudiced by his refusal to made the requested stipulation; stating the requirement for such a condition would be in conflict with Congressional Policy that contracts be let to the lowest responsible bidder as said policy was asserted to be established by Section 3709.

It is interesting to note, as appears from the foregoing opinion, that The Director of Procurement had submitted Circular Letter No. 100 to the Comptroller General before it had been circulated and requested an opinion as to the form of the instrument and as to whether the requested agreement would be enforceable. The Comptroller General had approved the form of the letter and had answered the question stated in the affirmative. Apparently, he was not asked by the Director of Procurement to pass upon, and did not express an opinion, whether the proposed agreement could be required as a condition to awarding a contract.

The status of the matter then is, that a request can be made of a bidder that he agree to the desired labor standards, but no discrimination can be made between those bidders who do and those who do not comply with the request. Therefore, to all practical intents and purposes no such contractual provisions are legally possible under the Comptroller General's ruling until express legislative authority is extended.

IV. CONSTITUTIONALITY.

As indicated by the heading of this memorandum, the assignment required answering two questions, one as to Constitutionality, and the other as to the desirability of the proposed legislative plan. A categorical answer to the first question is that the law man constitutionally require, in contracts of the United States or of agencies of the United States relating to the purchase of property, construction enterprises, furnishing of services, or lending or granting of governmental funds, provisions which bind the second contracting party to maintain in his or its business specified economic standards, and to demand that the same standards be set up by those contracting with said parties in respect to the subject matter involved in the original contract with the United States or its agencies.

It may be safely assumed that the foregoing statement will not be questioned from any responsible source. In making so confident an assertion, it is to be borne in mind that the question does not directly

involve the problem of legislative limitations of wages, hours, or child labor in general industry. As to workers in general industry engaged in hazardous occupations or in occupations where public safety is involved it is generally held that such legislation enacted by the states is constitutional. Holden v. Hardy, (Utah) 37 L. R. A. 103, 46 Pac. 756, affirmed (1898) 169 U.S. 366; W. B. & T. Railway Co., v. Gilmore, 8 Ohio C. C. 658; re Ten-hour Law for Street Railway Corporations, (R. I. (1902) 54 Atl. 602, 61 L. R. A. 612; People v. Lochner, 177 N. Y. 145, 69 N. E. 373, * But even here there is conflicting

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* This case was reversed in the United States Supreme Court, 198 U. S. 45; but on the theory that there is nothing distinctive about the work of a baker which justified special regulation.

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authority. Re Eight-hour law, (1895) 21, Colo. 29, 39 Pac. 328; re Morgan (1899), 26 Colo. 415, 58 Pac. 1071, 47 L. R. A. 52. Also as to women and children such legislation by the states is generally held constitutional. Com. v. Hamilton Mfg. Co., 120 Mass. 383; Com. v. Beatty, 15 Pa. Superior Ct. 5; States v. Buchanan, (1902) 29 Wash. 602, 70 Pac. 52, 59 L. R. A. 342; Wenhem v. State, (Nebr. 1902) 91 N. W. 421, 58 L. R. A. 825. The minority view on this phase of the labor question is stated in Richie v. State, (1895) 155 Ill. 98, 29 L. R. A. 79, 40 N. E. 452. Where the limitation is general, there have been a number of cases which have held such laws passed by the states to be unconstitutional. Law v. Rees Ptg. Co., (Nebr. -- 1874) 59 N. W. 362; 24 L. R. A. 702; Fisk v. People (Ill. -- 1900) 58 N. E. 958, 52 L. R. A. 291; State v. McNalley, (La. -- 1896) 21 So. 27, 36 L. R. A. 533.

However, the question before us pertains to limitations on governmental enterprises and the constitutionality of such legislation is affirmed by Atkin v. Kansas, (1903) 191 U.S. 207, 48 L. Ed. 148 and Ellis v. United States, (1907) 206 U. S. 246, 51 L. Ed. 1047.

The first-named case involved the validity under the Constitution of the United States of the statute of Kansas which limited to eight hours the day's work for all persons employed by the state or any of its sub-divisions, or employed by contractors or sub-contractors in execution of any contract for the state or its sub-divisions. The Court held that the freedom to contract guaranteed by the Fourteenth Amendment to the United States Constitution was not infringed by the aforesaid statute. In the opinion we read:

> "It may be that the state in enacting the statute, intended to give its sanction to the view * * * that the restriction of a day's work to that number of hours would promote morality, improve the physical and intellectual condition of laborers and workmen, and enable them to develop to discharge the duties appertaining to citizenship. We have no occasion here to consider these questions * * * or * * *. We can imagine no possible ground to dispute the power of the state to declare that no one undertaking work for it or for one of its municipal

> agencies should permit or require an employee on such work to labor in excess of eight hours each day * * *. On the contrary, it belongs to the state, as a guardian and trustee for its people, and having control of its affairs, to prescribe the conditions upon which it will permit public work to be done on its behalf, or on behalf of its municipalities".

The Ellis Case, above cited, sustained the eight-hour law of August 1, 1892, being Chapter 352, 27 Stat. A. L. 340, which applied to laborers and mechanics employed by the United States, the District of Columbia, or any contractor or sub-contractor upon any of the public works of the United States or the District. The Court said:

> "The contention that the Act is unconstitutional is not frivolous, since it may be argued that there are relevant distinctions between the power of the United States and that of a state. But the arguments naturally urged against such a statute apply equally for the most part to the two jurisdictions, and are answered, so far as a state is concerned, by Atkin v. Kansas * * *. We see no reason to deny to the United States the power thus established for the states. Like the states it may sanction the requirements made of contractors employed upon its public works by penalties in case those requirements are not fulfilled."

In the statement of the National Association of Manufacturers filed with the Senate Committee on Education and Labor in opposition to the Walsh Bill, the following admission was made:

> "We recognize the complete authority of Congress to determine the conditions under which Government contracts will be granted and public moneys loaned, granted, expended or otherwise disposed of. We recognize that there are few limitations upon this power. We, therefore, agree that Congress may make it a condition in the disbursement of public funds that the recipient shall comply with certain standards as to wages, hours and the employment of minors."

As to precedents for statutory requirements for wage and hour clauses in Government contracts may be cited the Eight-hour law of 1912, the Bacon-Davis Act of 1931 requiring payment of not less than the prevailing wage scale on certain public works, Section 301 A-1, Emergency Relief Construction Act of 1932, Section 206, Title II, N.I.R.A., and the formula adopted by Congress governing wage rates in the Relief Appropriation Act of 1933.

It may be remarked however, that in respect to the form of the proposed legislation there was one serious legal question involved, which is dealt with in Part VI of this memorandum.

V. DESIRABILITY OF THE PLAN.

In considering the desirability of the plan there would be three questions:

First, is it desirable for the Government to undertake by any method whatever, the regulation of economic conditions in industry;

Second, if so, whether it should be done now; that is, at this session of Congress; and

Third, whether the particular plan under discussion in this memorandum is a desirable one.

Only the third question above stated is directly involved in this memorandum.

Starting with the assumption that some form of Federal regulation of economic conditions in industry is to be attempted, then this memorandum asserts that the one under discussion as applied to wages, hours and prohibition of child labor, would be practical, effective and desirable. The plan might be utilized either as an adjunct to other attacks upon this problem or as a forerunner of other plans which might be effectuated in the future.

The following reasons may be asserted in support of the plan:

1. The fundamental proposition involved is the power of the Government to control its own business affairs; and this should readily gain an affirmative popular response.

2. In establishing economic standards it is appropriate that the Government should proceed by precept, before, or at least as soon as, it does by command. It does so by requiring such standards in its own contracts.

3. The preliminary work of framing and considering legislation has already been done in connection with the Walsh Bill.

4. Even the opponents of the plan concede that it is not barred by unconstitutionality.

5. If, as some assert, legislative standards are necessary or desirable, this is not a matter of great complexity. They could be established in a variety of ways. For instance, the last draft of the Walsh Bill set up the standards by reference to those "as on May 26, 1935 were specified in the codes of fair competition * * * purporting to apply to their respective trades or industries, or as was specified in the President's Reemployment Agreement * * * where there were on May 26, 1935 no approved codes * * *".

6. The plan has the advantage of being a voluntary one, since nobody is required to seek Government contracts.

7. If it be charged that the plan amounts to a Government subsidy, it may be answered that existing law reveals many subsidies, including the protective tariff.

8. If it be urged that it violates the traditional policy of Government to contract with the lowest responsible bidder, it may answer that the oldest policy of our Government is that of the right of its citizens to "life, liberty and the pursuit of happiness"; and that no person can be considered qualified for the pursuit of happiness nor endowed with genuine freedom, if he is subjected to economic oppression.

9. To the argument that industrial strife would be aroused by the setting up of two standards of wages and hours for the same type of work, - namely, one for those engaged on Government contracts, another for those in strictly private enterprise, it may be answered that the most violent economic strife may ultimately be expected if the Government should continue a laissez faire policy.

10. If it be alleged that costs to the Government will be increased, it may be answered that increased contract costs will be compensated by increased revenues from improved National prosperity.

11. The results of the plan would be important, if it affected only parties with contracts with the Government and with the governmental agencies, together with their subcontractors, because of the vast ramifications of governmental action.

12. The benefits would not be limited to those employees engaged on Government contracts, because often, if not generally, when a business concern accepted a Government contract, it would realize the impracticability of maintaining two standards for its employees, and would extend to all of them the favorable standards required for those engaged on the Government project.

13. The inevitable tendency would be toward the general improvement of conditions, because in businesses which are not engaged in Governmental contract work, there would be a tendency for the employees to demand and employers to grant the standards for which Government contracts would furnish conspicuous examples.

VI. MUST CONGRESS FIX THE STANDARDS?

The Walsh Bill (Senate Bill 3055) as originally proposed to Congress provided that Government contracts should contain provisions that "all persons while engaged in the carrying out of the contract will be paid not less than such minimum wages, and employed not to exceed such maximum hours,

as shall be designated specifically or by reference in the invitation to bid, and that no person under 16 years of age * * * * be employed." Thus it was contemplated that Congress state the standards as to child labor, but otherwise left the standards to administrative action. But in the revised draft of the bill the standards were legislatively fixed in the manner already set forth in Part V (5), in so far as may pertain to articles manufactured subsequently to the effective date of the Act and prior to letting of the contract, and setting up a special formula by which the standards should be fixed as to work done after awarding the contract.

It can only be surmised whether the sponsors of the legislation made this change merely as a matter of policy, or whether they considered it necessary to insure constitutionality. An attack upon the constitutionality of this feature of the Act as originally drawn had been leveled. The National Association of Manufacturers in opposing the bill had stated (see proceedings before Senate Committee on Education and Labor):

> "The measure, therefore, contains practically the identical defects of the code-making provisions of the National Industrial Recovery Act which were invalidated in the Schechter poultry decision, since there is no standard whatever to guide the President in the determination of the wages and hours to be imposed. There is no legal distinction between a delegation of authority in the field of Government contract and a delegation generally, as was done in the Recovery Act."

So far as the record shows, in the proceedings incident to formulating the Walsh Bill, this idea that "legislative standards" were necessary, was asserted by some and tacitly accepted by others. However, the writer of this memorandum desires to raise a very definite question of the correctness of that view.

It seems obvious, in spite of the statement of the National Association of Manufacturers (above quoted), that there <u>is</u> "legal distiction between a delegation of authority in the field of Government contract and a delegation generally as is done in the Recovery Act."

It is the distinction between the right of the Government to say whether and on what conditions it will deal with "X" in a governmental transaction, and the right of the Government to say on what conditions "X" and "Y" shall deal between themselves in a private transaction.

<u>Atkin</u> v. <u>Kansas</u>, 191 U. S. 207, (referred to in Part IV of this memorandum) authoritatively points the "legal distinction," and it seems to the writer authoritatively lays the predicate for answer to the query whether the standards must be legislative. We quote:

> "* * * * whatever may have been the motives controlling the enactment of the statute in question, we can imagine no possible ground to dispute the power of the state to declare that no undertaking work <u>for it or for one of its municipal agencies</u> should permit or require an employee on such work to labor in excess of eight hours each day * * *. It cannot be deemed a

part of the liberty of any contractor that he be permitted to do public work in a mode he may choose to adopt without regard to the wishes of the state." (Underscoring represents italics by the Court).

Rules concerning delegation of power and legislative standards in such cases as the Schechter decision, which concern attempts by the Government to regulate by statute business transactions to which it is not a party, are not authorities on the question of the method by which Government shall make contracts regarding its own business.

If we were to seek for a case to lend color to the contention that the standards of Government contracts must be set by legislative action, probably the most nearly applicable case would be Connolly v. General Construction Company, 269 U. S. 385, which seems to have been perhaps the chief case relied on before the Senate Committee to establish the necessity of legislative standards. Yet, when thoughtfully examined, this case is no authority for such contention.

It was an action in which the Construction Company sought to restrain State and County officials of Oklahoma from enforcing a state statute which declared it a criminal offense for any contractor or sub-contractor engaged on a state project to pay less than the "current rate of pay in the locality where the work is performed." The Court held the law invalid (though Justices Holmes and Brandeis did not assent to this) stating:

"We are of the opinion that this provision presents a double uncertainty, fatal to its validity as a criminal statute. In the first place the words 'current rate of wages' do not denote a specific or definite sum, but minimum, maximum and intermediate amounts, indeterminately, varying from time to time and dependent upon the class and kind of work done,* * *. * * * *to direct the payment of an amount which shall not be less than one of several different amounts, without saying which, is to leave the question of what is meant incapable of any definite answer.

* * * * * * * * *

"In the second place additional obscurity is imparted to the statute by the use of the qualifying word 'locality.' Who can say with any degree of accuracy, what areas constitute the locality where a given piece of work is being done."

It is to be noted that the Oklahoma case concerned a criminal statute, where a rule of strict construction applies. As the Court said (Page 393):

"The citizen cannot be held to answer charges based upon penal statutes whose mandates are so uncertain that they will reasonably admit of different construction. A criminal statute cannot rest upon an uncertain foundation. The crime, and the elements constituting it, must be so clearly expressed that the ordinary person can intelligently choose in advance what course it is lawful

for him to pursue. Penal statutes prohibiting the doing of certain things and providing a punishment, should not admit of such a double meaning that the citizen may act upon the one conception of its requirements and the Court upon another."

Certainly when the Legislature undertakes to declare it a crime not to pay adequate wages, it must specify a standard of adequate wages. This has no bearing on whether it may permit an executive agency to refuse to contract with a firm which the executive agency determines to its own satisfaction is not paying adequate wages.

Furthermore, if the legislative department undertakes to set standards they must be understandable. It does not necessarily follow that it must set standards at all.

Is the purchase of a gross of pencils, or an automobile, or a gun boat, or selecting a building contractor, a legislative or an executive matter? The writer will not venture a categorical answer. Of course, Congress can step in and control any of these matters, just as it could control whether employees of N.R.A. shall begin work at 8:00 or 9:00 A. M., or any other matter of routine executive action; but until it does so, the executive branch is free to act according to its own discretion.

Why does the Executive Department have to advertise before awarding a contract? Because Section 3709 R. S. requires it.

Why must the Executive Department award the contract to the lowest responsible bidder? Because Section 3709 requires it, (or at least the Attorney General and Comptroller General and two or more inferior courts have so interpreted that section).

Why cannot the Executive Department award contracts to whomsoever in their discretion is best entitled to them? Only because of Section 3709.

Therefore, if Congress will in any way relax the bar of Section 3709, could not an Executive Department, in its discretion, award its contracts only to those firms which, by way of illustration, maintain a thirty-hour week? Congress might relax the bar by the simple expedient of saying (in effect) that governmental agencies may include in their contracts, provisions governing the hours and wages of employees engaged in executing those contracts.

During the examination of Solicitor General Stanley Reed before the Senate Committee considering the Walsh Bill, the following questions and answers were had:

THE CHAIRMAN: Do you think that provision that you have just read is delegating the power of the Executive?

MR. REED: No, we do not think the question of delegation arises in this type of act.

THE CHAIRMAN: I agree with you. You say it did not?

MR. REED: It is the operation of a government function through its own Executive Department, and they act simply as agents of Congress in spending the money.

If as Mr. Reed said, in the matter of contracts the executive agencies "act simply as agents of Congress in spending money," it might logically be argued that they could not spend it in such a manner as to seek to affect collateral purposes not in the mind of Congress.

Are they "simply agents of Congress"? Or are they performing duties of the Executive Branch in the matter of making contracts? It would seem to be only by analogy that they are referred to as "agents of Congress", although it is true they are acting administratively to carry out plans which Congress has authorized and for which it has supplied the funds.

Let us carry the analogy further. If it be agency, a principal may permit as wide a scope of authority as he desires to his agent.

Of course Congress cannot commit legislative authority to an "agent". But to refer to making government contracts as a "legislative" matter is begging the question. It is an "administrative" matter. But if forced to say either that it is a "legislative" or an "executive" function, the writer of this memorandum would choose the latter term.

Edward S. Corwin, Professor of Jurisprudence in Princeton, in his book "The Twilight of the Supreme Court" (1934), (at page 133), gives an expansive view of the field of executive authority:

> "Executive power is residual power - it is what is left of the original competence of government after the relatively specialized functions of legislation and adjudicatiore have been substracted therefrom."

It would appear to be in line with the foregoing idea to say that the formulation of contracts is such a power of "original competence", except so far as restricted by legislative enactment.

The same author says further (p. 136):

> "So also, it early became necessary to attribute to the United States certain corporate capacities, the right to sue and be sued, the right to enter into contracts, the right to ask the courts to cancel fraudulent contracts, and so on and so forth; and <u>invariably the custodian of such capacities was held to be the executive departments</u>." (underscoring inserted)

The following citations were given: (Note 83, p. 221)

> "See 3 Wheat. 172 (1818); 5 Pet. 115 (1831); 10 Pet. 343 (1836); 15 Pet. 290 (1841); 104 U. S. 444 (1881); 125 U. S.

The question may well be raised whether the authority thus delegated to the President, is not as subjectto attack as would have been a delegation of power to fix the standards in the first place. If one delegation would be invalid, would not the other be likewise invalid?

VII. EXECUTIVE DISCRETION.

In spite of the apparent effort in the Walsh Bill to set up legislative standards, they remain essentially of an administrative nature. Of necessity, this would be true, as was partially recognized by Mr. Gall, who appared for the National Association of Manufacturers in opposition to the legislation before the Senate committee.

He claimed, referring to the bill in its original form (p. 28 of the Proceedings at the Committee Hearing):

> "It is our opinion, therefore, that the Bill, as now drafted, is invalid, and that it must necessarily be redrafted so that the Congress itself will supply standards for the application of the provisions with respect to minimum wages and maximum hours. The bill as it now stands provides no standards whatever but it would be possible under the measure, as now drafted, for any minimum wages and maximum hours to be fixed; for different minimum wages and maximum hours to be fixed by one agency from those fixed by another for similar classes of work; or for this vague authority to be so utilized as to give executive agencies an unnecessary and unwise control over the various industries through their power to condition proper wage and hour requirements on the assent of particular industries to other policies of the same agencies in no way connected with the contracts, purchases, loans or grants in question."

But he conceded (p. 32 of the Proceedings at the Committee Hearing):

> "We do not contend that Congress must fix the exact wages to be paid or the exact number of hours to be worked. Indeed, we think it would be very unwise for Congress to undertake to lay down any rigid rules to be applied under all conditions throughout all the industries of the United States, and to all the persons covered within the generous terms of the pending bill."

The re-drafted Walsh Bill seems to comply with the Gall suggestions. Yet, analysis shows the legislative standards are shadowy and Executive authority the substance of the proposed regulations.

As already pointed out in this memorandum, Congress adopted, by a reference, the standards of the codes of fair competitoon and the PRA, for the guidance of industry until advised in an invitation for bids as to the standards to be required in future operations. These future standards are to be set by the President, or by those to whom he may, under Section 10 of the bill, delegate the authority so to do. It is the duty of the President, or of his representatives, in establishing these standards, to consider four yardsticks: (a) the cost of living;

(b) existing local standards; (c) standards in effect during the year 1934; (d) NRA standards in effect on May 26, 1935. But these standards are so elastic that the Executive Department may stretch or contract them as it sees fit, attaching as much or as little importance to each as it may desire.

The extreme of Executive authority is reached in Section 6, which provides, inter alia,

> "The President may provide reasonable limitations and may make rules and regulations allowing reasonable violations, tolerances, and exemptions to and from any or all provisions of this act on the extent of the application of this act to contractors, sub-contractors, suppliers, borrowers, or grantees, as hereinbefore described."

Critics of the Act might say, without being entirely illogical, that this section gives the President power, in practical effect, to amend and suspend the Act at will, since there is in the foregoing provision no limitation on the number or character of variations and exemptions which he may make, so long as they are "reasonable."

Yet without some such a wide scope of Executive discretion, this bill or any other effective bill for the same purposes would, this memorandum asserts the opinion, be impracticable. For instance, take the fact that Section 1 says no government contract may be "modified" unless the other contracting party certifies to past and future compliance with the applicable wage, hour and child labor standards. Assume an existing contract for a public building, the plans of which it became essential to modify, or for aeroplanes, the specifications for which, on account of some new invention, had be come obsolete. Assume that the contractor, being under no obligation to comply with code standards because his contract ante-dated the effective date of the Act, had continued operations without meeting those standards. Then he could not make the required certificate of compliance, and the modifications of the contract could not be made, in spite of the Government's necessity. But Section 6, giving the President power to make variations and exemptions, saves the situation.

Take the fact that one submitting a bid must certify not only that he will comply with the prescribed standards in the future, but that "since the effective date of this Act" he has complied with the old NRA standards as to everything" in connection with or which may be identified as part of the subject matter of the purchase or contract." Suppose the Government had to purchase supplies for some emergency need - say flood relief - but suppose there were no available supplies of the required type in existence which had been manufactured in compliance with the prescribed standards. Would the necessities of the Government have to go unsatisfied? While this assumes an extreme state of facts, the requirement of the law that the standards apply "from the date the law takes effect," means they would attach as to many bidders who had produced goods with no thought that they would be used in government contracts, and consequently difficult situations would be likely to arise even if not of the magnitude of the flood relief situation we have imagined. But Section 6 saves all these situations.

Again, consider the fact that this Act applies to contracts for loans and grants to sovereign states and to municipalities, imposing on them the obligation of requiring from all parties with whom they deal certificates of compliance with the federal wage and hour standards. It may well be presumed that some states will be found to have constitutional provisions, or statutory provisions similar to the federal law, embraced in Section 3709 R. S. (as interpreted). In such circumstances, negotiations between the Federal Government and the State or its municipality would be blocked. But this situation also is saved by Section 6.

If then, legislation along the line of the Walsh Bill is desirable and if (as just stated) it is necessary to the practical working of such a statute that wide discretion be left to the Executive branch of the Government in regard to variations in standards, it may be considered fortunate if the opinion of this memorandum regarding the nature of standards is correct. For if they need not be fixed by Congress, but may be left to the executive department entirely or so far as policy dictates, argument against constitutionality is practically foreclosed.

James W. Irwin